facilities are projected to serve 1,000 telephone lines and 250 cable subscribers, BellSouth will allocate 80% (1000 divided by 1,250) of the joint and common costs of those facilities to telephony.[27]

III. DISCUSSION

9. Complainants allege that BellSouth violated various provisions of the Act and Commission rules by failing to allocate and record properly certain costs and benefits to its cable affiliate.[28] Specifically, Complainants allege that BellSouth (1) violated section 254(k) of the Act[29] and the Commission's cost allocation rules[30] by employing the "subscriber circuit" methodology described above to allocate certain costs between its telephone service and cable service; (2) violated the Commission's affiliate transactions rules[31] by failing to attribute to its cable affiliate the market value of the benefits that its cable affiliate allegedly received when BellSouth constructed cable systems without first obtaining franchises under section 621(b) of the Act;[32] and (3) violated sections 202(a) and 224(g) of the Act by not

[27] The parties call this a "subscriber circuit" methodology. *See, e.g., Tennessee Cable Telecommunications Association, et al., and Cable Association of Georgia, et al. v. BellSouth Telecommunications, Inc.*, Complainants' Reply Brief, File No. E-97-10 (filed Sept. 10, 1997) (Complainants' Reply Brief); Opposition Brief of BellSouth at 10.

[28] Complainants filed the instant complaint on January 27, 1997. Complainants had previously filed a complaint against BellSouth on October 22, 1996, however. *Tennessee Cable Telecommunications Association, et al. and the Cable Television Association of Georgia, et al., v. BellSouth Telecommunications, Inc.*, File No. P.A. 96-004. In a Letter Order dated January 13, 1997, the Common Carrier Bureau stated that this initial complaint "raise[d] both conduit rate issues, which would normally be handled under the Commission's pole attachment complaint procedures, and cross-subsidization and imputation issues, which would normally be handled under the Commission's formal complaint procedures." *See Letter from Kurt A. Schroeder, Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau, to Michael Tanner and John D. Seiver*, dated January 13, 1997 (citations omitted) (*Schroeder Letter*). At the suggestion of the Common Carrier Bureau, counsel for the parties consented to a bifurcated approach: The conduit rate issues would proceed according to the Commission's pole attachment complaint procedures, 47 C.F.R. §§ 1.1401, *et seq.*, and the common carrier issues would proceed according to the Commission's formal complaint procedures, 47 C.F.R. §§ 1.720, *et seq.* The Common Carrier Bureau thus dismissed the common carrier-related claims in the 1996 complaint without prejudice, and invited the complainants to refile the common carrier claims pursuant to section 208 of the Act. *Schroeder Letter*.

[29] 47 U.S.C. § 254(k).

[30] 47 C.F.R. § 64.901.

[31] 47 C.F.R. § 32.27.

[32] 47 U.S.C. § 541(b).

charging its cable affiliate the same pole and conduit rates as it charges other carriers.[33] Complainants seek an order requiring BellSouth, *inter alia*: (1) to remove from its regulated accounts all deployment costs (including conduit, trenching, repaving, and other related underground construction costs) associated with its cable facilities; (2) to account for all affiliate transactions in connection with its cable construction; and (3) to identify and account for all anticipated usage of all unlit fiber optic and coaxial cable deployed throughout its telephone service area.[34]

A. BellSouth's Cost Allocation Methodology Does Not Violate the Commission's Cost Allocation Rules.

10. Complainants principally argue that the "subscriber circuit" cost allocation methodology used by BellSouth allocates joint and common costs between its telephony and cable services in a manner that effectively subsidizes the cable service with revenue collected from the provision of telephony services.[35] Specifically, Complainants assert that BellSouth's subscriber-based methodology misallocates costs because it does not reflect that telephone service and cable service use the capacity of jointly used facilities in vastly different ways. They point out that the number of cable subscribers is independent from the amount of bandwidth used by the service. In other words, "the total capacity used by the video delivery system is essentially unaffected by the number of subscribers";[36] the same video signal is continuously transported across the network regardless of the number of subscribers or the number of subscribers actually using the cable service at any given time. By contrast, as the number of telephone subscriber circuits increases, so does the proportion of the capacity of the transmission path devoted to telephone service.[37]

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[33] 47 U.S.C. §§ 202(a), 224(g).

[34] Complaint at 11-12, ¶ 44.

[35] *See, e.g.*, Complaint at 5, ¶¶ 18-20; *Tennessee Cable Telecommunications Association, et al., and Cable Association of Georgia, et al. v. BellSouth Telecommunications, Inc.*, Complainants' Opening Brief, File No. E-97-10 (filed Aug. 1, 1997) at 3-10 (Complainants' Opening Brief); Complainants' Reply Brief at 9-12.

[36] Complainants' Opening Brief at 4.

[37] BellSouth does not dispute Complainants' characterization of these differences between telephony and cable services. *See, e.g.*, *Tennessee Cable Telecommunications Association, et al., and Cable Association of Georgia, et al. v. BellSouth Telecommunications, Inc.*, BellSouth's Responses to Complainants' First Set of Interrogatories, File No. E-97-10, Response to Interrogatory No. 4 ("[C]able service subscriber circuits connect back to the network through a single coaxial wire cable which services multiple cable service circuits simultaneously (often referred to as a 'bus architecture'), while telephony subscriber circuits connect back to the network through multiple twisted pair wire cable where there is generally one twisted pair wire required for each telephony circuit (often referred to as a 'star architecture.').")(BellSouth's Responses to Complainants' First Set of

11. Complainants maintain that, in light of this difference between cable service and telephone service, the only "sensible way" to measure these services' relative "usage" of a shared communications facility "is by comparing the [*bandwidth*] *capacity* used by the unregulated video transport service as compared to the [bandwidth] capacity used by the regulated voice telephony service."[38] To describe how this bandwidth-based, cost allocation methodology would work, Complainants offer the following example: Assume a 60-channel analog cable video delivery system shares transmission facilities with a telephone system serving 10,000 customers. Each channel of such a cable system would use approximately 6 MHz of analog bandwidth, regardless of the number of cable subscribers, so the cable system's total usage of the transmission facilities' bandwidth would be 360 MHz (60 x 6).[39] Each customer of such a telephone system would use approximately 4,000 Hz, so the telephone system's usage of the transmission facilities' bandwidth would be 40 MHz (10,000 x 4,000).[40] Thus, the cable system would account for 90% of the facilities' "usage" (360/400 MHz), whereas the telephone system would account for 10% of the "usage" (40 MHz/400 MHz). Accordingly, under Complainants' bandwidth-based, cost allocation methodology, 90% of the joint and common costs of the shared transmission facilities would be allocated to the cable system, and only 10% allocated to the telephone system.[41] By contrast, under BellSouth's subscriber circuit methodology, the cost allocation to the cable system could never exceed 50%, and even 50% would be reached only in the unlikely event that each of the telephone system's 10,000 customers had only one telephone line and subscribed to the cable service (in which case, the calculation would be 10,000/20,000).[42] Complainants maintain that the bandwidth-based methodology is appropriate "because it is only the proportion of

Interrogatories).

[38] Complainants' Reply Brief at 9 (emphasis added).

[39] It is undisputed that each channel of analog video services uses approximately 6 MHz of bandwidth. *See* BellSouth's Responses to Complainants' First Set of Interrogatories, Response to Interrogatory No. 2.d.ii.

[40] It is undisputed that each analog telephone transmission uses 4 kHz (4,000 Hz). *See* BellSouth's Responses to Complainants' First Set of Interrogatories, Response to Interrogatory No. 2.d.i.

[41] Complainants' Opening Brief at 8-10; Complainants' Reply Brief at 7 n.8.

[42] If we increased the number of telephone service subscribers in this example to 100,000, BellSouth would allocate approximately 47% of the joint and common costs to nonregulated cable service. The shared facilities at issue here, however, are not used to provide telephony service to such a large number of subscribers, because the cable signal is transmitted separately over each local loop. As a result, we do not expect that the proportion of joint and common costs allocated to regulated telephony service would fall to this level.

bandwidth used — not the number of subscribers to either service — that reflects the actual usage of the facility by the different services."[43]

12. The parties agree that the rule governing our evaluation of BellSouth's cost allocation methodology is section 64.901(b)(4), which provides:

> The allocation of central office equipment and outside plant investment costs between regulated and nonregulated activities shall be based upon the *relative regulated and nonregulated usage* of the investment during the calendar year *when nonregulated usage is greatest in comparison to regulated usage* during the three calendar years beginning with the calendar year during which the investment usage forecast is filed.[44]

To apply this provision, a carrier must measure the comparative "usage" of the regulated and nonregulated services sharing network facilities. The two activities at issue here, however, use the shared facilities in different ways. To provide telephony service, transmission facilities must carry numerous unique, two-way, voice-grade communications.[45] Each telephony subscriber's use of the network increases the amount of bandwidth used, but the amount of bandwidth needed for each call is small, compared to video signals. By contrast, to provide cable video service, transmission facilities must continuously carry a single, one-way collection of video signals, which any subscriber can access at any time.[46] Each cable subscriber's use of the network has no effect on the total amount of bandwidth used to provide the service, but cable video service does require substantially more bandwidth than voice-grade service. Thus, if the costs associated with jointly-used facilities are allocated on the basis of total bandwidth used by each service, then a relatively large percentage of the costs will necessarily be attributed to the nonregulated service. If other usage measurements are used, however, such as the number of subscribers or the number of unique circuits, then the regulated service will bear a relatively larger percentage of the joint and common costs.

13. Recognizing these differences in the way these two services "use" the shared facilities, we conclude that Complainants have failed to demonstrate that BellSouth is applying section 64.901(b)(4) of the Commission's rules in an unreasonable manner by

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[43] Complainants' Opening Brief at 8-10; Complainants' Reply Brief at 7 n.8.

[44] 47 C.F.R. § 64.901(b)(4) (emphasis added).

[45] *See Allocation of Costs Associated with Local Exchange Carrier Provision of Video Programming Service*, Notice of Proposed Rulemaking, 11 FCC Rcd 17211, 17224, ¶¶ 30-31 (1996) (*Video Cost Allocation NPRM*).

[46] *Id.*

allocating costs associated with jointly-used facilities on the basis of the number of telephone lines and cable subscribers. In reaching this conclusion, we must consider the historical underpinnings of section 64.901(b)(4). The Commission adopted the cost allocation rules in 1987 to "inhibit carriers from imposing on ratepayers for regulated interstate services the costs and risks of nonregulated ventures."[47] At that time, the nonregulated services offered by local exchange carriers, such as voice mail, could be measured in much the same way that regulated telephony services are measured — via "minutes of use." Recognizing this fact, the Commission adopted rules that required carriers to allocate central office equipment and outside plant investment costs between regulated and nonregulated activities based upon measurements of the relative regulated and nonregulated *usage* of the investment.[48] At that time, incumbent local exchange carriers were generally not permitted to provide cable video service.[49]

14. After the Telecommunications Act of 1996 lifted the prohibition against incumbent local exchange carriers providing cable video programming directly to subscribers in their telephone service area,[50] the Commission recognized that its usage-based, cost allocation rules would be difficult for a carrier to apply in allocating its joint and common costs between regulated telephony services and nonregulated video services.[51] As noted above, the Commission recognized that the "minutes of use" measurement has little relevance to network usage characteristics of cable video services. Consequently, the Commission released a Notice of Proposed Rulemaking concerning whether and how "to amend [its] cost allocation rules and procedures to accommodate an incumbent local exchange carrier's use of the same network facilities to provide video programming service and other competitive offerings not subject to Title II regulation, as well as telephony and other Title II offerings."[52] The Commission stated that "[its] current cost allocation rules were not designed for this

[47] *Separation of Costs of Regulated Telephone Service From Costs of Nonregulated Activities*, Report and Order, 2 FCC Rcd 1298, 1299, ¶ 1 (1987) (*Joint Cost Order*).

[48] *Id.* at 1319-1320, ¶¶ 167-170.

[49] *See* Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 613(b) (codified at 47 U.S.C. § 553(b)). The telephone-cable cross-ownership prohibition did not apply "in rural areas" and could be waived by the Commission upon a "showing of good cause." *Id.* at § 613(b)(3), (4).

[50] Telecommunications Act of 1996 § 651, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. § 571.

[51] *See Video Cost Allocation NPRM*, 11 FCC Rcd at 17213-4, ¶ 2.

[52] *Video Cost Allocation NPRM*, 11 FCC Rcd at 17213, ¶ 2.

task."[53] The Commission has not yet modified its rules.

15. Given this background, we cannot conclude that BellSouth's allocation based on the number of telephone lines and subscribers is not a reasonable "usage"-based methodology of cost allocation when the nonregulated service at issue is cable. Section 64.901(b)(4) remains in place, and allows for the allocation of joint and common costs on any reasonable basis that measures relative usage. This flexible approach comports with the overall structure established by the Commission's cost accounting rules: The rules primarily provide frameworks within which carriers can craft unique practices that are reasonable, rather than rigid directives that allow carriers no discretion.[54] This approach also comports with the absence in section 64.901(b)(4) of any mandate requiring a particular manner of measuring usage, such as minutes-of-use or the amount of bandwidth used. Applying that approach here, we do not find that Complainants have proven that BellSouth's methodology falls outside the bounds of reasonableness. The "subscriber circuit" methodology employed by BellSouth measures the relative number of customers that use the network with respect to each service provided thereon. BellSouth's methodology thus roughly reflects the relative extent to which the shared facilities are being used by customers of each service. Accordingly, we cannot say that BellSouth's "subscriber circuit" allocation methodology fails to measure the relative regulated and nonregulated usage of shared facilities as required by section 64.901(b)(4).

16. Complainants also claim that, even if BellSouth's subscriber circuit allocation methodology does not violate section 64.901(b)(4) of the Commission's rules, it violates section 254(k) of the Act (and its mirror image, section 64.901(c) of the Commission's rules).[55] As indicated above, section 254(k) prohibits a carrier from "us[ing] services that are not competitive to subsidize services that are subject to competition."[56] In the context of examining sections 260 and 271 through 275 of the Act, the Commission has

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53 *Id.* at 17214, ¶ 2.

54 For example, section 32.27 of the Commission's rules states that, under certain circumstances, assets transferred and services provided between a carrier and its affiliate must be recorded by the carrier at "fair market value," but the rule does not prescribe how carriers may calculate fair market value. *See* 47 C.F.R. § 32.27.

55 47 U.S.C. § 254(k); 47 C.F.R. § 64.901(c). *See* Complaint at 9-10, ¶¶ 36-39; Complainants' Opening Brief at 3, Complainants' Reply Brief at 10. Complainants allege that the nonregulated service at issue here — cable video service — is subject to competition, and that the regulated service — basic telephony service — is non-competitive. Complaint at 9, ¶¶ 37-38. BellSouth denies that it offers non-competitive services, and refuses to admit that cable video service is competitive. Response at 8, ¶¶ 37-38. For the purposes of this analysis, however, we will assume that Complainants' allegations are correct.

56 47 U.S.C. § 254(k).

previously found that compliance with its pre-existing cost allocation rules in Part 64 is sufficient to satisfy section 254(k).[57] The reasoning there is equally applicable in this instance, and we see no reason to conclude otherwise here. Accordingly, our holding with respect to Complainants' claim under section 64.901(b)(4) of the Commission's rules is dispositive of Complainants' claim under section 254(k) of the Act. Accordingly, that claim is denied.

B. Complainants Have Failed To Meet Their Burden of Proving that BellSouth Violated the Commission's Affiliate Transactions Rules.

17. Complainants next argue that BellSouth violated section 621(b) of the Act[58] by constructing cable systems without a franchise.[59] Complainants further argue that, as a result of this alleged violation, BellSouth's cable affiliate received several intangible, but highly valuable, benefits from BellSouth: BIMS was allegedly able (1) to avoid extensive and costly local franchising processes; (2) to plan and schedule construction of the system without the normal permitting and make-ready delays often facing non-affiliates; (3) to generate market signals that a competing video system will soon be available, both to discourage subscribers from taking another video service and wait for BellSouth's offering and to discourage new competition from entering the market; and (4) to receive subsidization of its development and build-out costs. Complainants maintain that BellSouth's failure to account for the conveyance of these benefits violated the Commission's affiliate transactions rules provided in 47 C.F.R. § 32.27.[60] Accordingly, Complainants conclude that BellSouth must

[57] *See Accounting Safeguards Order*, 11 FCC Rcd at 17662, ¶ 275 (stating that the Commission's current accounting safeguards "prevent subsidization of competitive nonregulated services . . . by subscribers to an incumbent local exchange carrier's regulated telecommunications service," and finding that section 254(k) does not require additional safeguards for the particular services discussed therein.)

[58] 47 U.S.C. § 541(b) ("[A] cable operator may not provide cable service without a franchise.").

[59] Complaint at ¶ 12. *See also* Complainants' Opening Brief at 11-14; Complainants' Reply Brief at 13; *Tennessee Cable Telecommunications Association, et al., and Cable Association of Georgia, et al. v. BellSouth Telecommunications, Inc.*, Complainants' Supplemental Brief, File No. E-97-10 (filed Aug. 27, 1999) at 5-6 (Complainants' Supplemental Brief). In support of this allegation, Complainants cite sections 602(9), 621(a)(3), and 621(a)(4)(A) of the Act. 47 U.S.C. §§ 522(9), 541(a)(3), 541(a)(4)(A). Section 602(9) defines the term "franchise" as "an initial authorization . . . issued by a franchising authority . . . which authorizes the construction or operation of a cable system." 47 U.S.C. § 522(9). Section 621(a)(3) permits local franchising authorities to require that a cable system be constructed so that "access to cable service is not denied to any group of potential residential cable subscribers because of . . . the local area in which such group resides." 47 U.S.C. § 541(a)(3). Section 621(a)(4)(A) states that franchising authorities "shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area." 47 U.S.C. § 541(a)(4)(A).

[60] Complainants' Opening Brief at 17-18; Complainants' Reply Brief at 14-16; Complainants'

account for these benefits retroactively by valuing the use of its intangible franchise asset for nonregulated purposes according to the principles set forth in section 32.27 of the Commission's rules. In Complainants' view, "BellSouth should be required to assess the market value of the benefit that has been conferred on its cable operator affiliate by aiding that affiliate in circumventing the franchising requirements of the Act and then (a) credit regulated operations with that market value and (b) charge the cable operator affiliate with it."[61]

18. Complainants' contention that BellSouth violated the Commission's affiliate transactions rules hinges on two predicate assertions: (1) that BellSouth violated the Act by constructing cable systems before obtaining cable franchises; and (2) that the affiliate transactions rules apply to transfers of intangible benefits. While we have serious doubts about the validity of both assertions, we find it unnecessary to reach these issues. For even assuming that both assertions are correct, we find that Complainants have failed to prove that BellSouth actually transferred anything of value to its cable affiliate.

19. First, contrary to Complainants' contention, BIMS has not "avoided extensive and costly local franchising process[es]."[62] As BellSouth recognizes, prior to actually offering cable service to consumers, BIMS will have to obtain the relevant local franchises.[63] At most, then, BIMS's involvement in local franchising processes has merely been delayed, not avoided. Moreover, the factual record is insufficient to support the claim that BIMS avoided the "normal" permitting and make-ready delays allegedly often facing non-affiliates. Complainant has not provided any evidence supporting this assertion, such as a credible analysis quantifying the "normal" delays faced by similar projects and the *actual* delays faced by BIMS. As a result, this allegation is merely speculation.

20. The record similarly lacks any factual evidence to support Complainants' assertion that BellSouth's cable construction has conveyed any market benefits to BIMS. In particular, Complainants have provided nothing other than the argument of counsel to substantiate their assertion that BellSouth's cable construction somehow discouraged consumers from selecting a competitor's service and discouraged market entry by potential new competitors. Such speculation falls far short of the proof necessary to demonstrate that BIMS received from BellSouth some intangible competitive advantage in the cable market. Finally, given that Complainants have failed to prove that BellSouth's cable

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Supplemental Brief at 6-9.

61 Complainants' Supplemental Brief at 6.

62 Complainants' Supplemental Brief at 7.

63 47 U.S.C. § 541(b)(1); Opposition Brief of BellSouth at 15.

construction conveyed a benefit to BIMS, Complainants' assertion that BellSouth's payment of the cable construction costs conveyed a benefit to BIMS must similarly fail for lack of proof. Payments made by BellSouth to develop and build a network that has not yet benefited BIMS cannot constitute a transfer or provision of an asset or service to BIMS until BIMS indisputably receives a benefit by actually using the network for which the payments were made.[64]

21. In sum, although Complainants have proffered theories of how BellSouth *may* have conferred intangible benefits to BIMS, Complainants have provided no concrete factual proof that BellSouth did actually confer such benefits. In the absence of such proof (in the form of affidavits, business records, etc.), Complainants' claim that BellSouth violated the Commission's affiliate transactions rules must fail.

C. Complainants Settled or Abandoned All Remaining Claims.

22. In their Complaint, Complainants assert that BellSouth violated sections 202(a) and 224(g) of the Communications Act of 1934 by not charging or imputing to "itself, or any BellSouth cable television/video distribution affiliate, the pole or conduit rate it charges [Complainants] or other telecommunications carriers in its service area."[65] Prior to this Order, the parties reached a settlement on the claims pertaining to the conduit rates charged by BellSouth.[66] However, Complainants allege that the "imputation and discrimination claims" were not settled and remain at issue.[67] We disagree that these claims are currently before the Commission. Complainants failed to provide support for these claims at any time during this proceeding. Accordingly, we consider these claims abandoned.[68]

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[64] Of course, if Complainants had provided proof that merely the construction of the network itself had transferred or provided an asset or service to BIMS, even before BIMS begins to use the network, then Complainants could perhaps have persuasively argued that the development/build-out payments should be included in the value of the conveyance. As described above, however, the record contains no such proof.

[65] Complaint at 7-8, ¶¶ 30-31.

[66] *See* Complainants' Supplemental Brief at 2.

[67] *Id.*

[68] *See generally IT&E Overseas, Inc. v. Micronesian Telecommunications Corporation*, Memorandum Opinion and Order, 13 FCC Rcd 16058, 16073 (1998) (complainant in section 208 proceeding is required to develop and validate its claim with relevant statements of fact and supporting evidence).

IV. ORDERING CLAUSE

23. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 202, 208, 224, and 254(k) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 202, 208, 224, 254(k), and sections 32.27 and 64.901 of the Commission's rules, 47 C.F.R. §§ 32.27, 64.901, and under the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that the complaint filed by the Tennessee Cable Telecommunications Association, *et al.* and the Cable Television Association of Georgia, *et al.*, IS DENIED in its entirety.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
David H. Solomon
Chief, Enforcement Bureau

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were served this 26th day of April, 2000, by hand delivery on the following:

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DC01/SCHAM/111292.1